No. SC-2022-0719

IN THE SUPREME COURT OF ALABAMA

Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital,

Appellant,

v.

Patricia Bilbrey West, as Administratrix and Personal Representative of the Estate of John Dewey West, Jr., deceased.

Appellee.

AMICUS CURIAE BRIEF ON BEHALF OF THE BUSINESS COUNCIL OF ALABAMA IN SUPPORT OF SPRINGHILL HOSPITALS

FROM THE CIRCUIT COURT OF MOBILE COUNTY
CIVIL ACTION NO. CV-2016-901045

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INTRODUCTION

As noted in its motion for permission to file this amicus curiae brief, the Business Council of Alabama ("the BCA") is a non-profit, non-partisan organization representing the interests of the business community of Alabama. On behalf of its nearly one million working Alabamian members, it includes within its mission efforts to ensure a fair, just and predictable legal system. An aspect of that pursuit is resistance to punitive damage awards that exceed constitutionally prescribed limits. The imposition of excessive punitive damages cripples established businesses and discourages entry into the State's economy of otherwise interested outside businesses. Proper constitutional checks and balances on the permissible size of punitive damages are needed at both the trial court and appellate court level to ensure a fair and just legal system faithful to the rule of law and to promote a reasonably secure business climate nourishing business growth and innovation. To that end, the BCA feels compelled to speak out when there are efforts to liberalize and weaken the standards established for maintaining constitutionally faithful oversight and control of the severity of punitive damage awards.

It is for that reason the BCA seeks to be heard in support of the following propositions relevant to this appeal:

(1) That punitive damage awards reviewed by the Court should be measured by comparison with only those awards upheld by it subsequent to the landmark U.S. Supreme Court decision of BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996).

(2) That prior punitive damage awards utilized for comparison purposes should not be artificially revised upward to derive new comparative amounts on the basis of an inflation adjustment.

By thus limiting the scope and focus of this brief, the BCA should not be thought to lack full support for the other issues Defendant/Appellant Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital (hereafter simply "Springhill") is raising in this appeal. To the contrary, they strike the BCA as legitimate and deserving of the treatment Springhill requests in its principal brief, but that brief adequately presents and advocates those issues. Therefore, the BCA confines itself to the two issues stated above, because they are matters of

general concern to its membership and this determination will have global application outside of this case.

SUMMARY OF THE ARGUMENT

This Court, in reviewing prior punitive damage awards upheld by it, for the purpose of comparison to a punitive damage award under review, should consider only its decisions issued subsequent to, and in adherence to the due process "notice" requirement of BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996).

Additionally, prior punitive damage awards utilized for comparison purposes should not be artificially revised upward to derive ne comparative amounts on the basis of an inflation adjustment.

ARGUMENT

(1) That punitive damage awards reviewed by the Court should be measured by comparison with only those awards upheld by it subsequent to the landmark U.S. Supreme Court decision of BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996).

In its certiorari review of this Court's decision in BMW of North America, Inc. v. Gore, 646 So.2d 619 (Ala. 1994) (hereafter "Gore I"), which had approved upon remittitur a $2,000,000 punitive damage award, the Supreme Court of the United States declared in BMW of

North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (hereafter simply "Gore") the theretofore unexpressed principle that:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.
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> 517 U.S. at 574-575.

Of course, this pronouncement of an application of federal constitutional law is binding on this Court under the "Supremacy Clause," U.S. Const. Art. VI. See, e.g., Ex parte State ex rel. Alabama Policy Institute, 200 So.3d 495, 528 (Ala. 2015), abrogated on other grounds by Obergefell v. Hodges, 576 U.S. 144, 135 S.Ct. 2584, (2015) (". . . decisions of state courts on federal questions are ultimately subject to review by the United States Supreme Court . . . .") and Title Max of Birmingham, Inc. v. Edwards, 973 So.2d 1050, n. 3 ("The Supremacy

Clause of the Constitution of the United States prohibits this Court from rejecting those federal policies with which it may disagree.")

In his special concurrence in Gore, Justice Breyer, joined by Justices O'Connor and Souter, observed that the seven-factor test this Court had adopted in Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989) (hereafter "Green Oil"), and which had been approved by that high court in Pacific Mutual Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991), was proving insufficient as a means for properly evaluating punitive damage awards for constitutional conformity. ("But, as the Alabama courts have authoritatively interpreted them, and as their application in this case illustrates, they impose little actual constraint." 517 U.S. at 589)

The impact of the dramatic "sea change" in the process for constitutionally assessing punitive damage awards for excessiveness wrought by Gore was manifest in the ensuing decision of this Court on remand from the U.S. Supreme Court. In its original review of the punitive damage award in Gore I in 1994, this Court had upheld, under its review approach informed by the seven-factor test set out in Green Oil, that a remitted punitive damage award of $2,000,000 would pass constitutional muster. Upon its reconsideration of that award upon

remand by the Gore Court, this Court determined that, "in light of" the refocused explanation of the due process standards in Gore, the size of the punitive damages award approved just three years before was in fact constitutionally excessive. Applying the new approach directed by Gore, this Court determined that a $1,950,000 reduction of the punitive damages called for, down to $50,000. BMW of North America, Inc. v. Gore, 701 So.2d 507 (Ala. 1997) (For ease of reference, the U.S. Supreme Court's decision in this trilogy of decisions is cited simply as Gore; this Court's 1994 decision is cited as Gore I and its 1997 decision on remand is cited as Gore III.)

In Gore III, the record on appeal reviewed by this Court was the same as in Gore I and the Green Oil factors looked to were the same. What necessitated the significant about face in analysis were the new standards imposed by Gore. This Court acknowledged that reality at several points in its opinion in Gore III:

> The United States Supreme Court announced, for the first time and by a 5–4 vote, that a punitive damages award, even one that is the product of a fair trial, may be so large as to violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court determined that, under the Due Process Clause, a defendant has the right to fair notice not only of the conduct that may subject him to punishment, but also of the severity

> of the penalty that a state may impose for such conduct. *BMW,* 517 U.S. at ——, 116 S.Ct. at 1598.
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> The Supreme Court then remanded the case to this Court, for us to reassess the punitive damages award for excessiveness in view of its opinion.

701 So.2d at 509.

> The Supreme Court held in *BMW* that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." 517 U.S. at ——, 116 S.Ct. at 1598.
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> The Supreme Court's decision in *BMW* now requires that state courts reviewing jury verdicts challenged as violating the federal Due Process Clause determine whether the tortfeasor had adequate notice that the conduct for which the jury found him liable could subject him to punishment. Due process also requires, and state courts must now determine, whether the tortfeasor had adequate notice of the severity of the penalty that might be imposed for the activity he engaged in.

701 So.2d at 510.

The Gore III Court opined that, "Alabama, by providing a judicial review of punitive damages, provides notice of the range of amounts of punitive damages a defendant may expect to pay for conduct described in § 6–11–20. This Court refined the elements of judicial review for

excessiveness of jury verdicts in 1989 by adding specific *Green Oil* factors to the *Hammond* review." 701 So.2d at 511. In looking back over its published opinions and those of the Court of Civil Appeals affirming awards of punitive damages subsequent to Green Oil (but importantly for this appeal, "excluding wrongful death cases"), the Court further opined that the body of case law had "provided notice of the amount of punitive damages a jury might impose." (Id.) In n. 4 to its opinion, the Court explained that:

> Out of the more than 100 published opinions dealing with punitive damages since 1989, when the *Green Oil* review was implemented, fewer than 10% have affirmed punitive damages awards that still exceeded $2 million after appellate review. In several of those cases where the punitive damages award affirmed exceeded $2 million, the large amount of the compensatory damages awards indicated a level of misconduct that would clearly justify an unusually high punitive damages award. See *Duck Head Apparel Co. v. Hoots,* 659 So.2d 897 (Ala.1995) ($4,350,000 compensatory damages and $15,000,000 punitive damages); *Sears, Roebuck & Co. v. Harris,* 630 So.2d 1018 (Ala.1993), *cert. denied,* 511 U.S. 1128, 114 S.Ct. 2135, 128 L.Ed.2d 865 (1994) ($850,000 compensatory damages and $2.5 million punitive damages). In approximately 50% of the published opinions, the punitive damages award affirmed was $100,000 or less, and in approximately 80% the punitive damages award affirmed was $1 million or less.

Of course, given that Gore was only one year old at that point, this Court had no choice but to look back behind it for comparator awards. Even so, the results of its survey listed immediately above are telling.

Although this Court had mentioned generally in some of its pre-Gore punitive damage award reviews that consideration had been given to prior awards upheld on appeal,[1] that aspect of constitutionally appropriate review had not been fleshed out, nor had it been acknowledged to be mandatory.

Consequently, for example, in Atkins v. Lee, 603 So.2d 937 (Ala. 1992), the Court noted the seven factors test of Green Oil (none of which involved a comparison with prior comparator award decisions of the Court), and discussed four of them, but never alluded to any notion that a comparison with prior punitive damage award amounts might be appropriate. Moreover, the U.S. Supreme Court itself, contrary to its decision only three years later in Gore, stated in the plurality opinion in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113

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[1] See, e.g., Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050, 1053 (Ala. 1987) ("After careful consideration, . . . upon making a comparative analysis with other awards allowed in similar cases . . .," but no specific prior cases referenced.)

S.Ct. 2711 (1993), that the defendant's suggestion that a proper due process review of punitive damages should include comparator awards, was too impractical to be a test for assessing the constitutionality of a punitive damage award:

> Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.
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> Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.
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> 509 U.S. at 457, 458.

It was only in Gore, decided three years after TXO, that one of the three criteria the U.S. Supreme Court established to guide a due process review of punitive damages, required the reviewing court to take into account "the civil penalties authorized or imposed in comparable cases." 517 U.S. at 575.

In Lance, Inc. v. Ramanauskas, 731 So.2d 1204 (Ala. 1999), a wrongful death case, this Court explained that " . . . under *BMW v. Gore*, we must compare the damages awarded in this case to damages awarded in similar cases." (Emphasis supplied.) Rejecting the trial court's

reliance "on several pre-BMW fraud cases," the Court noted that "[t]hose cases are not analogous to wrongful-death cases." 731 So.2d at 1219. After reviewing the awards "in recent wrongful-death cases" (Id.), the Court ordered a remittitur of the wrongful death punitive damage award from $13 M to $4 M, in part because of "the vast difference in the amount of the jury's verdict in this case as compared to verdicts in similar cases." 731 So.2d at 1221.

The last medical malpractice wrongful death award upheld by the Court which could have provided Springhill notice as of the June 2014 events of the potential severity and magnitude of a punitive damage award, was Boudreaux v. Pettaway, 108 So.3d 486 (Ala. 2012). There, the Court upheld a punitive damage award remitted from $20,000,000 to $4,000,000 by the trial judge. That affirmance was in part due to the trial court having "performed a comparison of the present award with those in similar cases and determined that it was not disproportionate." 108 So.3d at 504. However, of the five cases the trial court had looked to for comparison, only two were post-Gore. They involved affirmances of punitive damage awards of $2,000,000 and $3,000,000. 108 So.3d at 501. Moreover, the $4,000,000 award was upheld against the defendants'

assertion that it would devastate them financially, by including in this Court's assessment of their assets the strength of their potential bad-faith-failure-to-settle claim against their insurer, as evaluated by the trial court. 108 So.3d at 505. That feature of Boudreaux was subsequently abrogated by this Court's decision in Gillis v. Frazier, 214 So.3d 1127 (Ala. 2014). Therefore, that correction by Gillis would logically justify a discount of some degree of the $4,000,000 award for comparator purposes.

Although this Court's September 2021 decision of Bednarski v. Johnson, 2021 WL 4472478, ___ So.3d ___ (Ala. 2021) could not provide Springhill with any due process notice of potential severity of a punitive damage award as of the 2014 events at issue here, it is the latest discussion by this Court of medical malpractice wrongful death punitive damages. The BCA respectfully submits that the special writing in Bednarski by Justice Mitchell, joined by Justice Bolin, calling for use of post-Gore punitive damage decisions of the Court for the purpose of identifying cases appropriate for comparison, represents the best view. As this Court observed in Robbins v. Sanders, 927 So.2d 777, 790 (Ala. 2005), a referenced 1989 case involving punitive damages, "antedates the

more definitive pronouncements by the United States Supreme Court concerning considerations that must attend an assessment of the possible excessiveness of punitive damages, beginning with *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Additionally, this Court, developing its own jurisprudence and attempting to understand and apply the United States Supreme Court's more recent opinions on point, has spoken more definitively on the subject." The BCA is mindful that the majority opinion in Bednarski deflected that statement as "not a holding by this Court that all decisions released by this Court before Gore was decided are irrelevant for the purpose of applying the 'comparable cases' guidepost." Bednarski, 2021 WL 4472478 at *19. Nonetheless, the statement in Robbins represented the recognition by a unanimous panel of this Court that Gore had effected a major change in the analytics a reviewing court was to employ in order to conduct a proper due process review of a punitive damage award, including the newly articulated mandate that a person receive "fair notice" of the severity of a potential civil penalty, with the result that failure to provide "adequate notice of the magnitude of the sanction" could contribute to the conclusion that a particular punitive damage

sanction was excessive. Gore, 517 U.S. at 575. As noted earlier in this brief, this Court clearly recognized in Gore III the markedly new discipline of punitive damages review instituted by Gore. So much so that its reconsideration "in the light of Gore," of the $2,000,000 punitive damage award it had approved in Gore I, caused it to conclude that no more than a $50,000 penalty was constitutionally permissible. As Justice Mitchell correctly observed in his special concurrence in Bednarski,

> Gore came about only because punitive-damages awards in Alabama had been increasing both in frequency and magnitude -- out of step with the rest of the country -- in the years preceding that decision.
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> Five of the eight cases identified by [the Plaintiff] as comparable cases were decided within that early 1990s period when punitive-damages awards were at their apex in Alabama. After the United States Supreme Court explained in Gore that such awards violated the due-process rights of defendants, it cannot reasonably be disputed that this Court -- applying the framework set forth in Gore -- began to more closely review and rein in excessive awards. See Hogg, Alabama Adopts De Novo Review for Punitive Damage Appeals, 54 Ala. L. Rev. at 227 (noting that "the impact of the Gore decision was soon apparent in Alabama in the magnitude of awards and their remittitur" and that "[t]he first ten cases decided on appeal after Gore (including Gore on remand) proved the Alabama Supreme Court's readiness to limit damages it considered excessive"). Thus, the pre-Gore cases cited by Cortney are, at best, of limited relevance when comparing the $6.5 million award here to awards made in other cases. Rather, our

> analysis of comparable cases under the third Gore guidepost should be focused on cases decided after Gore that properly apply the framework developed in that case. (Footnotes omitted.)

Therefore, in order to capture a reliable set of cases for comparison purposes, the decisions looked to must be those in which this Court applied the new approach required by Gore. To include in the comparison universe punitive damage awards that were only measured by the less rigorous pre-Gore standards of review would unavoidably distort the proper frame of reference.

The major restructuring of the due process analysis put in place by Gore, and this Court's adherence to it in its subsequent analysis of punitive damage awards, disqualify pre-Gore awards as reliably comparable comparator awards.

Consequently, for purposes of due process notice to Springhill in June of 2014 of the severity and magnitude of potential punitive damage awards, the by-then-accumulated body of post-Gore cases would have indicated a range dramatically below the $10,000,000 award at issue on this appeal.

(2) That prior punitive damage awards utilized for comparison purposes should not be artificially revised upward to derive new comparative amounts on the basis of an inflation adjustment.

The trial judge in this case noted the following in his consideration of comparison punitive damage awards: "Plaintiff argues the Court should consider the impact of inflation on these prior verdicts and awards and offered the testimony of Dr. Robert W. McLeod, an economist at the University of Alabama in support of this theory. The Court finds these arguments persuasive, especially the general argument that the value of a prior award, whether entered in 1999 or another year prior to this date, must be adjusted to some degree if it is to compare to an award entered today." (C. 4365-66) That sort of ex post facto increase in prior punitive damage award amounts would certainly catch a defendant unawares with respect to the due process advance notice of severity and magnitude required by Gore. Particularly would that be so where, as here, the claim pled by the plaintiff was death caused by negligence, albeit with alleged attendant reprehensibility. This Court has never approved of such a "cooking the books" alteration of prior comparator awards. In fact, when Justice Houston recommended in his special concurrence in Gore I consideration of an "inflation adjusted" view of prior punitive damage

awards, the other six justices concurring in the per curium opinion did not see fit to even take note of that notion in their de novo review. More recently, in Bednarski, n. 8, this Court deflected plaintiff's argument that his proffered list of prior punitive damage awards "should be adjusted for inflation," because the Court's conclusion that the defendants had failed to demonstrate reversible error with respect to the $6.5 million award at issue, meant "we need not decide whether to adopt [plaintiff's] inflation argument." As noted above, however, in this case the trial judge did adopt the plaintiff's inflation argument. And did so in face of the fact that in performing its independent de novo reviews of punitive damages over the years, this Court had never endorsed such a revisionist approach to the comparison of prior awards. Given the "blank slate" nature of the de novo analysis the Court has declared itself obliged to conduct, the Court would certainly have noted and adopted an inflation adjustment if it had considered that to be a reliable and permissible feature of a properly conducted review of comparison cases. It would not have needed to have a party argue for that approach but, rather, would have the obligation on its own to incorporate it in its review.

In the final analysis, the due process notice requirement of Gore with respect to the severity and magnitude of potential civil penalties would be significantly undercut if the historical range of punitive damage awards approved by this Court could be altered upward by some inflationary factor not yet known or knowable at the time of the conduct to which that notice would relate. Certainly, in June of 2014, Springhill could not have known the punitive damage awards then available to put it on "notice" could thereafter be completely altered by some unknowable future inflationary factor, including the extraordinary inflation rate surge of 2022. The due process notice requirement of Gore assumes that a party engaging in conduct at a point in time, could survey the then-existing range of allowed civil sanctions and be persuaded thereby to reconsider its course of action. That involves a retrospective "snapshot," not an economist's prospective guesswork about possible future inflation rates. In her "Opposition" to Springhill's post-trial motions, plaintiff argued for inflation adjustments for comparator awards, providing charts to reflect an inflated value for four prior awards upheld by this Court. In each instance, the value thus calculated was inflated all the way up

through 2022, disregarding that the stopping point for due process notice to Springhill would have been June of 2014.

Additionally, and importantly, any inflationary pressures will already have been automatically accounted for in the current value of a defendant's assets and income – the fourth Green Oil factor that will be a part of the review process, of "the financial position of the defendant."

Therefore, attempting after the fact to manipulate prior awards upwards would distort and skew their use as reliable comparators and create a "double counting" by virtue of the influence of inflation on a defendant's assets and income.

CONCLUSION

Prior punitive damage award decisions of this Court looked to for comparison purposes should only be those issued subsequent to Gore, and the amounts of those awards should not be revised upward on the basis of some inflation adjustment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitations set forth in Ala. R. App. P. 29(c) and 28(b) and (j) (i.e., 14,000 words for an *amicus* brief). According to the word-count function of Microsoft Word, this Brief contains 4,007 words. I further certify that this Brief, prepared in Century Schoolbook font using 14-point type, complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). *See* Ala. R. App. P. 32(d) (certificate of compliance).

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2022, I electronically filed the foregoing brief and served the following by electronic mail and/or United States Mail to their regular mailing addresses:

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